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6 IN THE UNITED STATES DISTRICT COURT
7 FOR THE DISTRICT OF ARIZONA

8 United States of America,
9 Plaintiff/Respondent,

10 vs.

11 Porfirio Ochoa Acosta,
12 Defendant/Petitioner.

No. CR 11-529-TUC-CKJ

ORDER

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14 Pending before the Petition for Writ of Error Coram Nobis (Doc. 31) filed by
15 Petitioner Porfirio Ochoa Acosta (“Acosta”). The response filed by the government states
16 it does not oppose the requested relief.

17 *Writ of Error Coram Nobis*

18 Although the writ of error *coram nobis* was abolished as a form of relief from civil
19 judgments by Fed.R.Civ.P. 60(b), the Supreme Court has held that it survives as a
20 post-sentence remedy in criminal cases and that the district courts have power to issue the
21 writ under the All Writs Act, 28 U.S.C. § 1651(a). *United States v. Morgan*, 346 U.S. 502
22 (1954). “A petition for a writ of *coram nobis* provides a way to collaterally attack a criminal
23 conviction for a person . . . who is no longer ‘in custody’ and therefore cannot seek habeas
24 relief[.]” *Chaidez v. United States*, 568 U.S. 342, 345 n. 1 (2013); *Estate of McKinney By*
25 *& Through McKinney v. United States*, 71 F.3d 779, 782 n. 5 (9th Cir. 1995).

26 In this case, Acosta asserts it is undisputed that, following the issuance of a removal
27 order, Removal Order, Ex. A (Doc. 31-1), neither Acosta nor his attorney were served with
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1 the written decision as required by 8 C.F.R. § 1240.13(a) and (d). Therefore, Acosta did not
2 have an opportunity to file an appeal. Based on a similar case, Acosta asserts his appeal
3 would have been successful. *See* Anastacio MACIAS A035 022 353 (BIA September 26,
4 2000), Ex. B (Doc. 31-1). Following Acosta's arrest for illegal re-entry in this case, Acosta
5 was convicted and sentenced. Acosta alleges his attorney was ineffective for failing to
6 realize that Acosta's removal order was invalid.

7 Acosta's current attorney filed a motion to reopen removal proceedings with the
8 Immigration Court. Acosta summarizes:

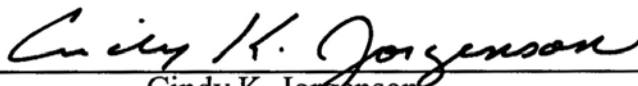
9 On March 19, 2018, the Immigration Court, finding the removal order invalid, entered
10 an order reopening removal proceedings. Although the motion to reopen was filed
11 almost 20 years after entry of the invalid removal order, the Immigration Judge found
exceptional circumstances warranting equitable tolling of the 90 day time limit for
filing a motion to reopen.

12 Immigration Order, Ex. K (Doc. 31-1). Acosta's removal order has now been vacated and
13 could not have served as the basis for the conviction in this case. Acosta has presented a
14 colorable claim of actual innocence.

15 Accordingly, IT IS ORDERED:

- 16 1. The Petition for Writ of Error Coram Nobis (Doc. 31) is GRANTED.
- 17 2. The conviction and judgment in *United States v. Porfirio Ochoa-Acosta*, CR
18 11-529-CKJ, is VACATED and SET ASIDE.

19 DATED this 3rd day of June, 2020.

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22 Cindy K. Jorgenson
23 United States District Judge
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